

USAWC STRATEGY RESEARCH PROJECT

**"SIX FLOORS" OF DETAINEE  
OPERATIONS IN THE POST-9/11 WORLD**

by

Lieutenant Colonel Thomas E. Ayres  
United States Army

Professor Dave Perry  
Project Adviser

This SRP is submitted in partial fulfillment of the requirements of the Master of Strategic Studies Degree. The U.S. Army War College is accredited by the Commission on Higher Education of the Middle States Association of Colleges and Schools, 3624 Market Street, Philadelphia, PA 19104, (215) 662-5606. The Commission on Higher Education is an institutional accrediting agency recognized by the U.S. Secretary of Education and the Council for Higher Education Accreditation.

The views expressed in this student academic research paper are those of the author and do not reflect the official policy or position of the Department of the Army, Department of Defense, or the U.S. Government.

U.S. Army War College  
CARLISLE BARRACKS, PENNSYLVANIA 17013

Report Documentation Page			Form Approved OMB No. 0704-0188		
Public reporting burden for the collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to a penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.					
1. REPORT DATE <b>18 MAR 2005</b>		2. REPORT TYPE		3. DATES COVERED -	
4. TITLE AND SUBTITLE <b>"Six Floors" of Detainee Operations in the Post 9/11 World</b>				5a. CONTRACT NUMBER	
				5b. GRANT NUMBER	
				5c. PROGRAM ELEMENT NUMBER	
6. AUTHOR(S) <b>Thomas Ayres</b>				5d. PROJECT NUMBER	
				5e. TASK NUMBER	
				5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) <b>U.S. Army War College, Carlisle Barracks, Carlisle, PA, 17013-5050</b>				8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)				10. SPONSOR/MONITOR'S ACRONYM(S)	
				11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION/AVAILABILITY STATEMENT <b>Approved for public release; distribution unlimited</b>					
13. SUPPLEMENTARY NOTES					
14. ABSTRACT <b>See attached.</b>					
15. SUBJECT TERMS					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT	18. NUMBER OF PAGES <b>40</b>	19a. NAME OF RESPONSIBLE PERSON
a. REPORT <b>unclassified</b>	b. ABSTRACT <b>unclassified</b>	c. THIS PAGE <b>unclassified</b>			



## ABSTRACT

AUTHOR: Lieutenant Colonel Thomas E. Ayres

TITLE: "Six Floors" of Detainee Operations in the Post-9/11 World

FORMAT: Strategy Research Project

DATE: 18 March 2005      PAGES: 40      CLASSIFICATION: Unclassified

There are persuasive legal, ethical and practical reasons for clarifying categories of detainees and improving guidance to those conducting detainee and interrogation operations in the post-9/11 environment. Analysts contend that the failure to categorize detainees captured during the GWOT as POWs under the Geneva Conventions, and the guidance for the treatment of detainees relegated to the status of "unlawful combatants," have led to widespread abuses. The US military is in the process of updating regulations and guidance on detainee operations to recognize new realities and address such criticism. This article advocates a specific direction for that process. The Geneva Conventions should be revised so as to provide more specific guidance for the treatment of unlawful combatants and to recognize a new category of combatants – terrorists. Absent the lengthy process of acquiring international consensus to update the Geneva Conventions, the US should promulgate its own delineation of categories of detainees, and publish standards for treatment by categories in compliance with the Geneva Conventions and other treaty obligations as currently written.



## TABLE OF CONTENTS

ABSTRACT.....	iii
LIST OF ILLUSTRATIONS .....	vii
"SIX FLOORS" OF DETAINEE OPERATIONS IN THE POST-9/11 WORLD .....	1
<b>THE CASE FOR A NEW SYSTEMATIC APPROACH .....</b>	<b>1</b>
<b>THE POST-9/11, U.S. APPROACH.....</b>	<b>4</b>
<b>PRE-9/11 U.S. ARMY DETENTION AND INTERROGATION DOCTRINE .....</b>	<b>7</b>
<b>THE CASE FOR CATEGORIZING DETAINEES SEPARATELY .....</b>	<b>9</b>
POWS - THE TOP FLOOR .....	10
LAWFUL INSURGENTS – THE FIFTH FLOOR .....	11
PROTOCOL I INSURGENTS – THE FOURTH FLOOR .....	12
UNLAWFUL COMBATANTS – THE THIRD FLOOR .....	13
TERRORISTS – THE SECOND FLOOR .....	16
NONCOMBATANTS - THE GROUND FLOOR .....	18
<b>CONCLUSION .....</b>	<b>20</b>
ENDNOTES .....	21
BIBLIOGRAPHY .....	29



## LIST OF ILLUSTRATIONS

FIGURE 1 – THE THREE BLOCK WAR .....	2
FIGURE 2 – THE “SIX FLOORS” OF DETAINEE OPERATIONS .....	3
FIGURE 3 - SECRETARY RUMSFELD MEMORANDUM .....	4





## "SIX FLOORS" OF DETAINEE OPERATIONS IN THE POST-9/11 WORLD

[A]ll you need to know is that there was a before 9/11 and an after 9/11. After 9/11 the gloves came off."

- Mr. Cofer Black, CIA<sup>1</sup>

Prior to 9/11,<sup>2</sup> many nations battled terrorists and multi-clad insurgents, and subsequently detained those combatants in places like Ireland, Israel, and Algeria. These nations wrestled with the applicability and relevance of the Geneva Conventions to their combat and detainee operations.<sup>3</sup> Oftentimes, they determined to conduct their detainee and interrogation operations by standards other than the Geneva Conventions.<sup>4</sup> The United States (U.S.) faced similarly-situated, ambiguous combatants in past conflicts, and decided "to extend basic prisoner of war protections to such persons ...based upon strong policy considerations, and ...not necessarily based on any conclusion that the United States was obligated to do so as a matter of law."<sup>5</sup> After 9/11, the U.S. ceased viewing its efforts against terrorism as a police enforcement action and embarked upon a Global War on Terrorism (GWOT).<sup>6</sup> In the act of declaring war on terror, the Bush Administration additionally advocated that this was 'a new kind of war' that justified reconsidering the manner in which the Laws of War would be interpreted and applied.<sup>7</sup> Secretary Rumsfeld stated: "The reality is the set of facts that exist today with the al Qaeda and the Taliban were not necessarily the set of facts that were considered when the Geneva Conventions was fashioned."<sup>8</sup> Certain provisions of the Geneva Conventions were even considered "quaint".<sup>9</sup> The U.S. has, by its policies and decisions, demonstrated that the standards for conducting detainee operations, and perhaps the Geneva Conventions themselves, are ripe for reform.

### THE CASE FOR A NEW SYSTEMATIC APPROACH

[S]ir, by no means is there a book that you can look up that runs through interrogation approaches and methods and has a check and a block that they comply or don't comply with the Geneva Conventions. This is a matter of judgment, a matter of rigor and a matter of oversight and interpretation.<sup>10</sup>

- COL Marc Warren, USA, Judge Advocate  
in response to questions of the Senate Armed Service Committee

During the U.S.' pursuit of the GWOT, there has been little academic or political agreement on what detention and interrogation techniques are ethically advisable and legally allowed. U.S. detainee operations in Afghanistan, Iraq and Guantanamo have been labeled the

“gray zone” by one author.<sup>11</sup> When the U.S. classified detainees in Afghanistan and Guantanamo Bay as “unlawful combatants,” the academic debate was voluminous and vociferous.<sup>12</sup> The lack of internationally-accepted, clearly-delineated detention and interrogation standards for treating “unlawful combatants,” contributed to the debate. Even in Iraq, where the Administration conceded the Geneva Conventions applied, the overall post-9/11 paradigm shift caused the Army’s command to conduct a deliberative and consultative, if ad hoc, analysis of acceptable interrogation and detention techniques.<sup>13</sup> The Department of Defense is currently undergoing a similar, more comprehensive and formal initiative with the Army acting as the lead agent.<sup>14</sup>

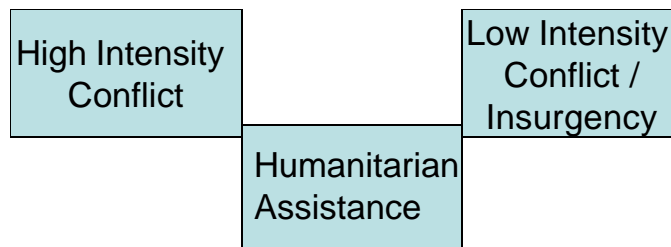


FIGURE 1 – THE THREE BLOCK WAR

Military success in complex operations, to include detention operations, requires understanding the basic foundations of those operations. In communicating the complexity of conducting modern military operations in an urban environment, General Charles C. Krulak coined the phrase “three-block war.”<sup>15</sup> One might say that the idea recognizes the obvious, but the phrase ‘three-block war’ succinctly captures the essence of identifying an environment where soldiers or Marines simultaneously fight a high-intensity conflict in one block, a simmering insurgency in another block, and facilitate humanitarian aid in a contiguous third block. U.S. military forces conducting modern military operations must anticipate they will encounter an array of friendly, hostile and neutral persons within the ‘three blocks’ that will be interrogated for operational or tactical reasons, and potentially detained. The recent criticisms and debate regarding U.S. detainee operations in Iraq, Afghanistan and Guantanamo Bay, have borne out that U.S. Forces do not have a similar, viable construct to consider the moral, legal and ethical parameters by which to conduct detainee and interrogation operations in post-9/11 operations.

Just as recognizing the presence and the ambiguity of the ‘three-block war’ begins the process by which commanders succeed in that environment, clarifying the lines of demarcation within the new “gray zone” of detainee operations is essential. Clearly delineating the potential categories of detainees is the starting point. Determining the legal responsibilities toward each

category of detainee is the logical next step. The Geneva Conventions provide the basis for considering different categories of detainees, and also the legal, ethical, and moral framework for differentiating treatment among the categories. Publishing the framework and clearly communicating that the U.S. faithfully adheres to well-enunciated and reasoned, if new, standards is additionally required to succeed strategically.

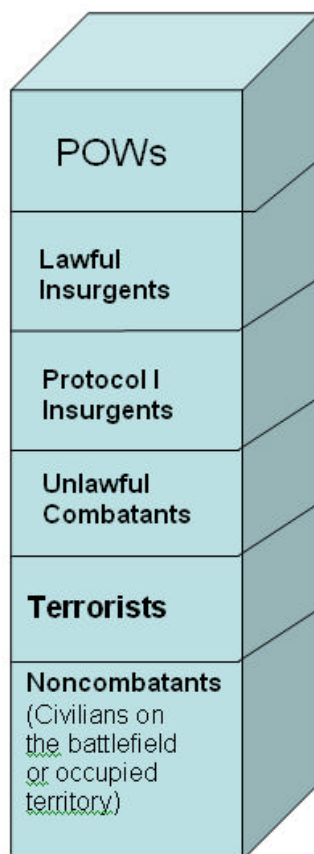


FIGURE 2 – THE “SIX FLOORS” OF DETAINEE OPERATIONS

Within the three-block war, U.S. Forces simultaneously encounter six different “floors” or categories of potential detainees. Each can not only be categorized separately by status, but also have a baseline “floor” of safeguards and legal protections. On the penthouse or top floor, reside the easily identifiable enemy prisoners of war (POWs). POWs openly wear the uniform of a power that abides by the Laws of War, and are accorded all privileges specified in Geneva

III (Convention on Prisoners of War).<sup>16</sup> On the fifth floor, reside lawful insurgents - those combatants who meet the Geneva criteria of openly bearing arms, wearing a distinctive insignia or marking, abiding by the Laws of War, and are organized under responsible leadership. On the fourth floor are those less well organized insurgents who may not have the ability, backing, desire, or organization to wear distinctive insignia but meet the other three Geneva criteria and therefore meet the criteria of Protocol I to Geneva III (to which the United States is not bound). On the third floor, reside unlawful combatants under Geneva III - those originally also named saboteurs and spies - who act as insurgents and seek to conduct warfare against military targets without regard to abiding by any of the Geneva criteria for lawful combatants. On the second floor are "terrorists:" those who meet the criteria of illegal combatants but additionally wage campaigns solely against civilian vice military targets with the intended effect of killing civilians or instilling fear and intimidation within the civilian population. Finally, on the ground floor are the gathering of noncombatants; this includes those suspected of assisting or encouraging those on the upper floors, those having knowledge about the whereabouts and methods of the members of the upper floors, those whose status or leanings are truly unknown, and truly innocent civilians.

#### THE POST-9/11, U.S. APPROACH

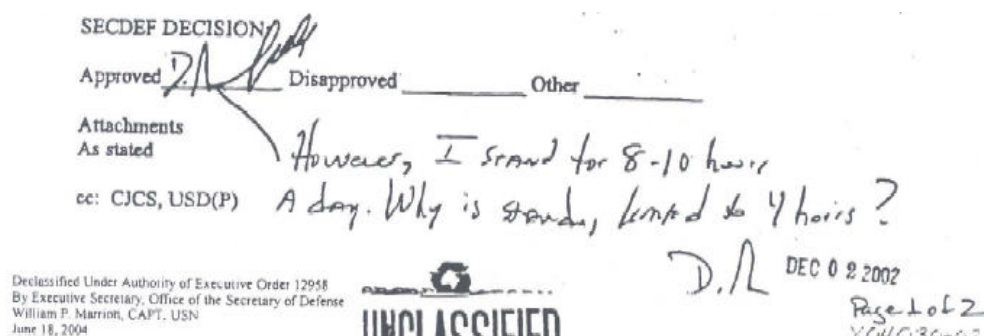


FIGURE 3 - SECRETARY RUMSFELD MEMORANDUM<sup>17</sup>

The Bush Administration's strict legal analysis and categorization of detainees in the pursuit of the GWOT is a useful starting point to analyze the levels of protection currently afforded by the Geneva Conventions. Prior to determining guidance with respect to allowable interrogation techniques, the Administration sought to distinguish GWOT detainees as something other than POWs as defined by, and with all of the protections of, Geneva III.<sup>18</sup> The underlying rationale was that such distinctions were necessary because the GWOT was a new

kind of war with a new kind of enemy.<sup>19</sup> The U.S. faced a wide-ranging global war with operations in as far-flung locations as Afghanistan, Yemen, Indonesia, and the Philippines, and consequently worried first that the Geneva Conventions placed obligations on international actors. The Administration judged these obligations in terms of legal, procedural, and monetary costs if Geneva categories of protected persons, protected places, and obligations as occupiers became commonplace during the GWOT.

With the backing of collective America still reeling and angry from the events of 9/11, the Bush Administration made an initial determination against granting POW status to Taliban and Al Qaeda members already detained in Afghanistan. On January 19, 2002, Secretary Rumsfeld transmitted a directive to the Combatant Commanders that members of Taliban and Al Qaeda under the control of the Department of Defense would be treated humanely but “are not entitled to prisoner of war status for purposes of the Geneva Conventions of 1949.”<sup>20</sup> On January 28, 2002, the President stated that he had met with his ‘national security team’ in the morning and decided that the detainees were illegal combatants and would “not be treated as prisoners of war.”<sup>21</sup> While stating that they were still discussing the “legal ramifications” of the determination, and that they had made no final determination, the President repeatedly referred to them as prisoners, and corrected himself to call them detainees.<sup>22</sup>

While the initial position staked out by the Administration resulted in some debate and consideration of alternatives, the ultimate position bore out the original predilection to avoid being bound by the constraints of Geneva III. On February 7, 2002, the President published a memorandum that set forth the results of his administration’s legal analysis.<sup>23</sup> The President noted that his decision came only “after extensive discussions regarding the status of Al Qaeda and Taliban detainees...”<sup>24</sup> The Administration began its analysis broadly by determining that U.S. action in Afghanistan met the criteria for an international conflict. However, they determined the Taliban were not considered POWs, even though they were covered by the Geneva Conventions, because the Administration determined the Taliban did not meet the international standards for lawful combatants. The Administration also deemed not to classify Al Qaeda as POWs because Al Qaeda was not a state, nor a party to the Conventions, nor did they meet the criteria for lawful combatants. The memo concluded that considering “our values as a Nation... as a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.”<sup>25</sup> The President’s memorandum also made no mention of the Administration’s position with respect to adherence to the Convention Against Torture (CAT),<sup>26</sup> perhaps never anticipating that the United States’ position and values

regarding the CAT would have been brought into question in later stages of the prosecution of the GWOT.

The Administration did not similarly articulate its position with respect to the legal status of the forces faced in Iraq prior to, and even well into, the conduct of Operation Iraqi Freedom (OIF). During the high intensity phase of the conflict, U.S. forces not only faced and captured numerous uniformed combatants it rightly treated as POWs, it also encountered forces it claimed functioned as unlawful combatants.<sup>27</sup> After the end of high intensity conflict, U.S.-led coalition forces struggled, and continue to struggle, against an array of insurgents and 'foreign fighters,' such as Zarqawi's "Al Qaeda in Iraq," whose status under the Geneva Conventions, is, at best, problematic. Yet, despite facing the same types of combatants and tactics in Iraq as in Afghanistan, the Administration's published position for detainees in Afghanistan and Guantanamo was not replicated for the conflict in Iraq. Rather, in hindsight of the Abu Ghraib scandal, the Administration declared "[t]he President made no formal declaration with respect to our conflict in Iraq because it was automatic that Geneva would apply...The war in Iraq is covered by the Geneva Conventions, so our policies there must meet those standards, in addition to the torture convention."<sup>28</sup> However, when an official spokesperson was directly asked about Zarqawi's status in Iraq, he could only responded that it is posed a "[v]ery interesting question."<sup>29</sup> Therefore, despite facing a similarly confused scenario of uniformed and non-uniformed enemies, and while stating that the United States' action to force regime change in Iraq was part and parcel of the GWOT, the Administration was slow to clarify the status of detainees in Iraq.

The Administration's approach to detention operations in Afghanistan and Guantanamo, and its slowness to address the issue for OIF, appear geared at alleviating a whole array of privileges and services under Geneva III as inappropriate to the post-9/11 Administration approach. The overall position has been that the "United States is treating and will continue to treat all of the individuals ...humanely and to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949."<sup>30</sup> However, the detainees in Afghanistan and Guantanamo "will not receive some of the specific privileges afforded to POWs, including: access to a canteen...a monthly advance of pay... the ability to receive scientific equipment, musical instruments, or sports outfits."<sup>31</sup> The Administration reasoned that severe security risks precluded affording all of the privileges allowed by Geneva III.

Even more importantly, the Administration appeared determined against applying the Geneva Conventions to the Taliban and Al Qaeda in order to preserve U.S. options and

flexibility in dealing with the detainees. Captured terrorists and their sponsors likely possess information which could prevent “further atrocities against American civilians,” and Geneva III’s strict guidance with respect to treatment of POWs is not conducive to attempts to obtain that knowledge or information.<sup>32</sup> U.S. officials further recognized that granting POW status to Taliban and Al Qaeda put U.S. interrogation agents at risk of prosecution, because any “outrages against personal dignity,” as prohibited by common Article 3 of the Conventions, could be domestically prosecuted as a war crime.<sup>33</sup> There was also an explicit recognition that designation of Taliban and Al Qaeda as POWs greatly restricted options with respect to their ultimate disposition.<sup>34</sup> By law and custom, POWs are normally repatriated and released from confinement at the cessation of hostilities. However, officials acted under the presumption that the ideological terrorists at issue must not be subject to release on those terms, and instead should be subject to incarceration indefinitely or for a term of years determined by a trial for their crimes. By not privileging Taliban and Al Qaeda with designation as POWs, the Administration kept open a realm of potential means by which they could ultimately be incarcerated and tried, to include military tribunals, domestic criminal courts, international war crimes tribunals, and even as POWs at court-martial. The status determination could arguably also lay the framework by which some terrorists could be turned over, extradited, or “rendered” to foreign nations who might not be as punctilious and restrained with respect to abiding by the CAT. The end result was that the Administration sought to keep its options open and refused to be placed into the confines of strict adherence to Geneva or within the former criminal approach.<sup>35</sup>

#### **PRE-9/11 U.S. ARMY DETENTION AND INTERROGATION DOCTRINE**

In declaring the Taliban and Al Qaeda as unlawful combatants, the U.S. not only dared to assume the lightning rod of public and international scrutiny, it called into question the underpinnings by which military operators had previously executed detention and interrogation operations. The U.S. had skirted the issue in past conflicts in Vietnam, Panama, Somalia, Haiti and Bosnia.<sup>36</sup> In those previous conflicts, as in Afghanistan, the U.S. often faced an enemy that did not meet the four criteria by which non-uniformed combatants obtained status as POWs under Geneva III. Those criteria exceed fighting in non-distinguishable clothing (out of uniform), but also not wearing a distinctive insignia recognizable at a distance, not carrying arms openly, not acting under the leadership of responsible command, and not conducting their operations in accordance with the Laws of War.<sup>37</sup> Therefore, whereas the U.S. military previously faced enemies that were illegal combatants by definition, operational and tactical doctrine broadly gave guidance that required strict conformance with Geneva and could boast examples of the



same. The “unlawful combatant” determination made previous doctrinal guidance, if not totally irrelevant, certainly subject to interpretation.

The U.S. Army is the Department of Defense’s executive agent for the conduct of detention operations, and the Army’s guidance for regulating detention operations is founded upon the principles of strict adherence to the Geneva Conventions.<sup>38</sup> The U.S. Army’s overall guidance for the conduct of detention operations is found in Army Regulation 190-8 and “implements international law, both customary and codified,” relating to “Enemy Prisoners of War (EPWs), Retained Personnel, Civilian Internees and Other Detainees.”<sup>39</sup> The Regulation recognizes shades of enemy compliance with Geneva by stating that Article 5 tribunals determine questionable status, but provide no practical guidance on the outcome of that status determination. Doctrine, therefore, provides, in practical effect, that all combatants, whether lawful or unlawful, are to be treated as POWs and is void on providing guidance if another status is determined. The U.S. Army’s “doctrinal guidance, techniques, and procedures governing employment of interrogators” are contained in Field Manual 34-52, Intelligence Interrogation, dated September 28, 1992.<sup>40</sup> That doctrine also self-proclaims that it applies “to operations in low-, mid-, and high-intensity conflicts.”<sup>41</sup> Even further, it contemplates the provision of interrogator support for the full range of nuanced low-intensity conflicts: insurgency and counter-insurgency environments, peacekeeping contingency operations, and, notably, “combating terrorism.”<sup>42</sup> The doctrine also recognizes that not all interrogations can be conducted by trained interrogators, but mandates that at the tactical level, where unable to obtain trained interrogator support, units should include “provisions and standing operating procedures (SOPs) for the ‘tactical questioning’ (not interrogation) of EPWs or detainees.”<sup>43</sup>

The overarching thrust of both the Regulation and the Manual is that the protections and limitations of the Geneva Conventions apply to all aspects of detention and interrogation operations. The interrogation Manual reiterates the “stated policy of the U.S. Army that military operations will be conducted in accordance with the law of war obligations of the U.S.”<sup>44</sup> The Manual further states the general guidance that all persons should be afforded the full protections and status of an EPW when there is a question as to their true status and gives no guidance on the practical effect of other than a POW status determination by an Article 5 tribunal. The Manual notes incongruously that in low-intensity conflicts it is important to differentiate between EPWs and criminals, but provides no substantive guidance as to how to, or whether to, treat criminals differently.<sup>45</sup> To accentuate the incongruity, it qualifies that, as a matter of policy, the procedures for interrogations, and the cloak of Geneva protections, applies to an even broader spectrum of categories of personnel than just those who meet the criteria of

protected persons under the Geneva Convention. Consequently, the Manual reiterates the general prohibition on the use of force and the affirmative obligations of the Geneva Conventions even with respect to the categories of: “-Civilian internees -Insurgents -EPWs -Defectors -Refugees -Displaced persons -Agents or suspected agents [and] -Other non- U.S. personnel.”<sup>46</sup> Clearly then, pre-existing Army doctrine recognized that differentiation amongst categories of detainees was possible, but straightforwardly directed that those differentiations and lines of demarcation would not be meaningfully recognized at the operational and tactical levels.

Analysts contend that the Bush Administration’s failure to categorize GWOT detainees as POWs have led to widespread abuses. Human Rights Watch for instance states the “pattern of abuse” at Abu Ghraib resulted from “decisions made by the Bush Administration to bend, ignore, or cast rules aside.”<sup>47</sup> The Administration, on the other hand, “categorically reject[s]” that the President’s determinations contributed to the abuses at Abu Ghraib.<sup>48</sup> Investigating Officers have found however that there was a causal connection such that some of the non-violent abuses of detainees in Iraq resulted from the failure to ensure uniform understanding of detention and interrogation guidance in theater.<sup>49</sup> The Commander in Chief’s specific finding that categorized specific detainees in the GWOT as “unlawful combatants” had effects in theaters other than originally intended. The determination carried not only significant legal consequences as to how the military could conduct its detainee operations and with what vigor those detainees could be interrogated in Afghanistan and Guantanamo, but larger practical consequences as well.

#### **THE CASE FOR CATEGORIZING DETAINEES SEPARATELY**

The current state of affairs provides persuasive practical reasons for clarifying categories of detainees and improving guidance to those conducting detainee and interrogation operations in the post-9/11 environment. There are also significant legal and ethical reasons to provide such guidance as the military revises its regulations and guidance to recognize post-9/11 realities. The revision process should consider the following approach. At the strategic level, the U.S. should take the lead to spur serious international consideration to update and revise the Geneva Conventions guidance with respect to treatment of detained persons so as to recognize the realities of the widespread adoption of terrorist tactics and the reality of the modern terrorist operations. The revised Conventions should provide disincentives for such behavior. Second, even absent the lengthy process of acquiring the international consensus to update the Third and Fourth Geneva Conventions, the Conventions themselves provide the

logical springboard to allow for a clearer delineation of categories of detainees, and suggest allowable differences in treatment to provide incentives for lawful combat and deter unlawful forms of combat. Finally, the U.S. military should provide specific and unequivocal guidance to forces at the operational and tactical levels on the gradations of treatment and levels of protection allowed to six specific floors of detainees.

#### POWS - THE TOP FLOOR

There seems little need, justification, nor inclination to change the status or protections of POWs. POWs have the greatest level of protections and benefits and deservedly so. By design, Geneva III provides an incentive for nation states, or other international actors, to wage war by means of uniformed armies. In providing this incentive, Geneva III attempts, as far as possible, to shield civilians from the ravages of war. Uniformed soldiers facing each other in a 'clean' war target each other based solely on their status and need not wait for their opposite's demonstration of hostile intent. In so doing, they restrict their targets to the opposing uniformed forces and lessen the chances of collateral civilian injury. Uniformed soldiers are also provided immunity from prosecution for their lawful wartime efforts, and take on the elevated 'protected person' status when they surrender or are rendered unfit for further combat (*hors de combat*).<sup>50</sup> Upon capture, they are entitled to a full array of privileges and benefits as POWs. Perhaps most importantly, the limitation upon the extent and vigor of interrogations of POWs is sacrosanct:

Every prisoner of war when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information...No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatsoever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.<sup>51</sup>

Such absolute protection is both justified and appropriate. Just by wearing the uniform and usual insignia, the enemy soldier not only opens himself to hazard, but he also assists in confining the conflict to uniformed forces to the benefit of civilian bystanders. More importantly, the uniformed forces exclusive presence on the battlefield as the fighting force relieves what is often the most perplexing question facing interrogators involved in insurgencies or combating terrorism – is this person who has been captured a combatant or an innocent civilian? Therefore, solely by wearing the uniform, the soldier helps alleviate harm for the civilians on the battlefield, and they also minimize the extent to which civilians might be subject to interrogation

as potential combatants. This is just the clarity that civilized society should promote when it is compelled to resort to warfare, and it is appropriately the behavior which Geneva III attempts to incentivize.

#### LAWFUL INSURGENTS – THE FIFTH FLOOR

In a similar vein, Geneva III provides clearly detailed guidance so as to provide an incentive for insurgents to wage their warfare in an open and distinguishable manner. The rationale for the incentive is clear: the Conventions recognize that not all warfare will be conducted by uniformed armies; that civilians will sometimes feel compelled to war against a state (as in the American Revolution in the 18th Century or the French Resistance in the 20<sup>th</sup> Century), but, as far as possible, those former civilians should conduct themselves like uniformed armies. The underlying hope being that if these combatants conduct themselves within the rules laid out below, then innocent bystander civilians will be at less risk of being injured collaterally. Specifically, Geneva III provides POW status and protections to:

Members of other militias and members of other volunteer corps, including those of organized resistance movements belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.<sup>52</sup>

Key to the language is the mandate that the irregulars “fulfill the following conditions.” The Convention therefore attempts to promote and by extension modify behavior by proscribing conditions that must be met and by outlining conduct that would allow combatants the privileges of POWs. The respected commentator Pictet noted:

Few questions produced more controversy in Geneva. Admittedly one could not dream of granting the protection of the Convention to all those who described themselves as partisan, or to individuals who took part in underground movement attacks or acts of sabotage. There will always be some patriots who will act outside the law, fully aware that they are doing so at their peril: heroism presupposes the danger of death. An effort was therefore made to determine the conditions which partisans must fulfill in order to benefit from prisoner-of-war status.<sup>53</sup>

Therefore, the Convention clearly provides an incentive to combatants to conduct themselves in a certain way: to urge them to set themselves apart from the civilian population at

large by wearing distinctive insignia and carrying their arms openly. The Convention then rewards that behavior with the lofty status and privileges of the POW if captured. As with POWs proper, such recognition and reward is well justified and should be continued.

#### PROTOCOL I INSURGENTS – THE FOURTH FLOOR

While the U.S. has not signed the 1977 Protocol Additional to the Geneva Conventions,<sup>54</sup> a slight gradation internationally exists between insurgents who meet “Fifth Floor” criteria and those who do not. The U.S. rejection of Protocol I is instructive to the reasons why the U.S. tendency is to view Protocol I insurgents as nearly synonymous with unlawful combatants. The presidential note forwarding Protocol I to the Senate is particularly instructive:

Protocol I. . . . would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves. These problems are so fundamental in character that they cannot be remedied through reservations. . . .<sup>55</sup>

For those countries which recognize it, Protocol I does in fact grant POW status to any combatant who carries his arms openly during actual engagements and just prior to an armed attack, and completely relieves the combatants of any of the other three criteria in Article 4 of Geneva III.<sup>56</sup> Whether the United States would want to provide incentive to combatants merely to carry their arms openly, and then only some of the time, is problematic. What is clear, however, is many of the U.S.’ closest allies have ratified Protocol I.<sup>57</sup> Therefore, the U.S. must recognize and straightforwardly address this reality as it conducts coalition detainee operations even if it chooses against treating the criteria and status of detainees differently. As a matter of principle and policy, the U.S. may categorize and treat Protocol I Insurgents as unlawful combatants. Such a conclusion follows not only from current practice as enunciated for the Taliban and Al Qaeda, but also from the logic that these combatants, both by their normal appearance and likely conduct immediately after capture, are not likely to make themselves known on the battlefield. Therefore, they do nothing to distinguish themselves from the population at large, and nothing to protect civilians from the general harms of warfare. As such, and as will be discussed more fully in the unlawful combatant section below, the international community should not provide an incentive to such conduct by providing the full panoply of POW privileges and protections for such behavior.

## UNLAWFUL COMBATANTS – THE THIRD FLOOR

The concept, identification and categorization of unlawful combatants have been recognized for decades; what has not been agreed upon is the standard for how this category of persons should be treated. Combatants who do not meet the criteria of POWs, militia as defined by Article 4, or Protocol I combatants, as discussed above, have been given the monikers: “unprivileged belligerents,”<sup>58</sup> “unprivileged combatants,”<sup>59</sup> “extra-conventional persons,”<sup>60</sup> “spies, guerillas and saboteurs,”<sup>61</sup> and officially by United States’ current policy, “unlawful combatants.”<sup>62</sup> As early as the United States Civil War, the Lieber Code, published in 1863 as the Union Army’s General Order No. 100, recognized such distinctions. The Lieber Code included instruction on the labeling and treatment of “armed prowlers” (non-uniformed saboteurs), “war-rebels” (non-uniformed partisans in occupied territory), and spies (non-uniformed intelligence gatherers), and detailed that, upon capture, each could suffer death as the equivalent to spies.<sup>63</sup> Such reasoning continued through modern times to include making such distinctions during the formulation of the Geneva Conventions in 1949. As noted by Geneva III’s most noted contemporary analyst Pictet, it was understood by the drafters that those who failed to abide by the criteria for lawful combat did so “at their peril.”<sup>64</sup> Even more recently, but prior to commencement of the current debate, the seminal work on the status and privileges of unlawful combatants similarly concluded that very few guarantees of protection were purposefully afforded to unlawful combatants:

The correct legal formulation is, it is submitted, that armed and unarmed hostilities, wherever occurring, committed by persons other than those entitled to be treated as prisoners of war or peaceful civilians merely deprive such individuals of a protection they might otherwise enjoy under international law and place them virtually at the power of the enemy. . . . International law deliberately neglects to protect unprivileged belligerents because of the danger their acts present to their opponents.<sup>65</sup>

While the current debate generally recognizes that there is a category that can be called unlawful combatants or some similar term, it also considers that the Conventions provide little to no guidance on how these unlawful combatants should be treated while detained. Perhaps in anticipation and recognition of the paucity of international guidance, the international community coalesced around and agreed to a baseline standard against torture in 1994 by means of the CAT. <sup>66</sup> The CAT applies not only to repressive regimes treatment of their own subjects, but also to detention of all lawful and unlawful combatants either in internal or international armed conflicts. It was into the black hole of international agreement that Secretary Rumsfeld boldly strode when he authorized interrogation standards that sought to impose measures less robust

than would violate the CAT, and yet more stringent than by which POWs may be questioned politely under Geneva III. Criticism immediately ensued, although some have jumped to the Administration's defense.<sup>67</sup> The tales of such treatment came to be called "stress and duress tactics" by the press while Secretary Rumsfeld's explicit guidance on detention and interrogation methods remained classified.<sup>68</sup> The documents have now been de-classified and are no longer secret. It is now known that the Administration's so-called 'stress and duress tactics' exhaustively include and are limited to:

Category I techniques...

- (1) Yelling at the detainee (not directly in his ear or to the level that it would cause physical pain or hearing problems
- (2) Techniques of deception: (a) Multiple interrogator techniques. (b) Interrogator identity. The interviewer may identify himself as a citizen of a foreign nation or as an interrogator from a country with a reputation for harsh treatment of detainees.

Category II techniques...

- (1) The use of stress positions (like standing) for a maximum of four hours.
- (2) The use of falsified documents or reports.
- (3) Use of the isolation facility for up to 30 days...
- (4) Interrogating the detainee in an environment other than the standard interrogation booth.
- (5) Deprivation of light and auditory stimuli.
- (6) The detainee may have a hood placed over his head...
- (7) The use of 20-hour interrogations.
- (8) Removal of all comfort items (including religious items).
- (9) Switching the detainee from hot rations to MREs.
- (10) Removal of clothing.
- (11) Forced grooming (shaving of facial hair etc.)
- (12) Using detainees individual phobias (such as fear of dogs) to induce stress.<sup>69</sup>

The above techniques were approved by Secretary Rumsfeld for use on limited case-by-case basis only with approval by appropriate officials. He did not approve, "as a matter of policy," the use of what was termed Category III techniques. Category III techniques can be

described generally as the “[u]se of mild non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing.”<sup>70</sup> Such physical contact was prohibited.

The debate on the strength and weakness of the legal arguments which classify Taliban and Al Qaeda as ‘unlawful combatants’ seems to have subsided; however, the debate around the morality and effectiveness of the detention and interrogation tactics synopsized above continues. Indeed, after the *Washington Post* reported on the Pentagon’s “stress and duress” tactics, Human Rights Watch began the effort to bring international pressure to bear against the United States to denounce the tactics.<sup>71</sup> Declassifying the “stress and duress” measures, despite their relative remoteness from conventional notions of torture, has not stemmed the controversy.

In recognition of the continuing discussion, it can be argued that the Administration’s current standards for treatment tend to counter productivity because the relative utilitarian gains possible with the techniques do not warrant the national and international censure. The logical extrapolation of the current Category I and II interrogation standards is that interrogators would gain valuable information by exceeding the standards of Article 17 of Geneva III (POWs not threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind), yet not rising to the level of the stated White House position or the CAT (“detainees will not be subjected to physical or mental abuse or cruel treatment.”<sup>72</sup>) The purveyors of the current techniques contend that in at least one case, where additional techniques were applied, valuable information was gained.<sup>73</sup> They do not however state whether the information gained was a direct result of additional techniques or would have been gained in any event in compliance with Article 17. Further, there is no contention that the additional techniques have been a widespread success beyond the one example cited. Conversely, a close examination of the explicit differences suggests that the stated advantage and additional techniques gained by exceeding Article 17, in the limited manner authorized, seem so slight as to be barely discernible when compared to the downside of advertising noncompliance with Geneva III. The logical conclusion of the rationale indicates that unlawful combatants will ‘crack’ and divulge information by means of threats, insults and unpleasant treatment not amounting to torture. This conclusion is unlikely and potentially irrational: the Defense Department openly advertises that many unlawful combatants have been trained in interrogation resistance techniques, and the conclusion defies widespread and typical experience.<sup>74</sup> Both anecdotal evidence and academic arguments favor that stress and duress tactics, used sparingly and by persons with extensive training and cultural understanding can have utilitarian value, but if made available



across the spectrum of military operations can lead to widespread scrutiny, criticism and even abuses.

In summary, unlawful combatants have long been recognized as a category of combatants. There is no clear standard, agreed to internationally, on how they should be treated when detained. The Bush Administration has identified that Taliban and Al Qaeda are unlawful combatants and enunciated clear standards on the how detainees in this category may be treated differently as opposed to POWs under Geneva. This standard has been heavily criticized and is being reviewed by the military currently in order to update operational doctrine and tactical guidance to the post-GWOT enunciated standard. U.S. military forces charged with implementing the standard would operate most effectively if acting under a standard that had international acceptance and consensus, that added utilitarian value to interrogator goals, and that provided some general level of dis-incentive to hostile forces from adopting tactics and methods which cause them to be considered unlawful combatants. The only reasonable hope of providing such a standard is if the community of nations can agree to determine the guidelines by which unlawful combatants can be treated and interrogated. As this agreement, or revision to Geneva III, is not likely in the near future, the U.S. military must continue to restrict its categorization of unlawful combatants to the environs of Afghanistan and Guantanamo Bay, and limit its treatment of unlawful combatants in those places to the exact standards approved by Secretary Rumsfeld.

#### TERRORISTS – THE SECOND FLOOR

The idea that terrorists can be categorized separately from unlawful combatants is not generally accepted and is advanced here *prima facie*. It rests upon the contention that terrorists differ markedly from unlawful combatants in that their tactics are even more heinous to civilization generally than is true of unlawful combatants generally or was considered at the time of Geneva. This conclusion relies upon the threshold distinction that unlawful combatants, though they fight unconventionally, recognize the principle of war of distinguishing the object of their attacks and target their attacks on military objectives generally and civilians only collaterally. Terrorists, on the other hand, view civilians as their primary target and view their purpose as using violence and intimidation amongst civilians in order to instill widespread fear throughout the civilian population or civilian leadership. Unlike partisan warfare, this current terrorist focus and tactic was not widespread prior to 1949. And, although the "Geneva Conventions of 1949 are excellent instruments of humanitarian law...they were unfortunately backwards-looking to the experience of World War II."<sup>75</sup> Therefore, had the current terrorist

tactic been widespread prior to consideration and adoption of Geneva, the drafters almost certainly would have attempted to determine methods to provide a dis-incentive to actors from adopting such a tactic, thus satisfying the overall direction of Geneva to isolate civilians from the ravages of combat.

As an academic matter, there is no international consensus nor notable national authority which currently recognizes the distinction between unlawful combatants and terrorists. Some might argue that identification of persons as heinous as terrorists and the reservation of especially harsh treatment was at least recognized prior to the middle ages by the Romans and as they fought what they termed "latrunculi-robbers, pirates, brigands, outlaws, 'the common enemies of mankind'."<sup>76</sup> Even though such an argument has not been adopted in modern times formally, as a practical matter several nations have identified terrorists as a special case and have embarked upon determining that they should be treated differently and more harshly. This is potentially important because international law is not only determined and codified by means of treaties, but international law values precedent recognizing long-standing and accepted conduct of nation-state actions in practice. Therefore, it is particularly instructive to consider specific case studies on how nations capturing and detaining terrorists treat them either currently or in the recent past. Such an analysis does not provide authority for U.S. military practitioners to treat them similarly, but does provide a useful starting point to consider how the international community might consider developing a standard by which a new category of 'terrorists' might be treated in the future.

Three case studies provide specific techniques of how terrorists are treated more harshly in the present day. The case studies stem from England and Israel's reported conduct and one alleged U.S. practice. England's treatment of captured terrorists in the Northern Ireland conflict resulted in a case being heard at the European Court of Human Rights.<sup>77</sup> In that case, British authorities were found to have used five interrogation methods, including hooding, wall-standing (a stress position), subjection to noise, and deprivation of food, drink and sleep. The European Court of Human Rights found that their treatment violated the European Convention on Human Rights and was therefore inhumane, but did not constitute torture. Similar techniques were used in Israel for a number of years, (shaking, stress positions, excessive tightening of handcuffs, and sleep deprivations), yet the Supreme Court of Israel deemed that the techniques caused pain and suffering and were illegal.<sup>78</sup> The Court did not however determine that the techniques rose to the level of torture. Finally, it has been reported, but not verified, that the U.S. has used the technique of 'rendering' captured terrorists to third-countries who might not be as punctilious in their adherence to the Laws of War and may be using torture to elicit

intelligence from rendered terrorists.<sup>79</sup> Such conduct would certainly violate Geneva if the combatants were granted protections of POWs, and would violate the CAT even if not granted the status of POWs. In all three cases, nations have apparently determined, at least temporarily, that terrorists' protections and privileges might fall below those afforded POWs, lawful combatants and unlawful combatants, yet are unwilling to cross the line of conducting torture themselves.

In summary, the category of terrorists is not academically or practically recognized and should not alter current detention operations. But, consideration should be given to the effort to determine whether terrorists should be less privileged than unlawful combatants. Of course, when drawing such nebulous lines between allowing inhumane treatment or allowing the infliction of minor pain and suffering but not amounting to 'torture' (physical or mental abuse), implementation of the policy necessarily relies upon the presumption that personnel on the ground executing the policy can discern the differences between and inflict the degrees required of these very subjective terms. In reality, even persons of good faith could argue over the effect of certain procedures and whether specific techniques constitute just 'unpleasant or inhumane treatment' or rather 'physical or mental abuse.' Accordingly, U.S. military practitioners in the field should consider the separate categorization and identification of terrorists but steer well clear of embarking upon treating terrorists other than as authorized within the determinations of treatment for unlawful combatants or POWs. Further, even if such national recognition or international consensus as to different categorization and treatment of terrorists does eventually come to fruition, the best course for military authorities would be to leave those who are categorized as terrorists to civilian agencies, such as the Central Intelligence Agency, who should arguably at least have greater experience and more specific, nuanced and detailed training in dealing with such detainees, and yet are also bound by the CAT.

#### NONCOMBATANTS - THE GROUND FLOOR

Geneva allows temporary internment of civilians for operational security or the security of the civilians themselves.<sup>80</sup> Accordingly, military forces the world over routinely temporarily detain and question civilians present on the battlefield. Such practice is commonplace because it recognizes that those civilians on the battlefield are at once both a potential source of valuable intelligence, as 'the sea in which the partisan fish swim,' and, if disguised as a non-uniformed combatant, one of the partisan 'fish' themselves. Army Field Manual 34-52 states the latter half of the problem succinctly: "failure of the enemy to wear a uniform results in an identification problem. As a result, large numbers of civilian suspects may also be detained during

operations.”<sup>81</sup> As questioning of civilians is commonplace, and normally conducted by a rank and file soldiers walking the ground, rather than by trained interrogators, the protections and privileges granted noncombatants should be well-known and thoroughly trained throughout the force.

Noncombatants fall under numerous protections and their treatment is accordingly given the strongest protection. Geneva grants noncombatants the status of ‘Protected Persons’ and gives them the protections of “Common Article 3” - so named because it appears identically in all four Geneva Conventions. Common Article 3 prohibits acts against noncombatants “at any time and in any place whatsoever” of violence, cruel treatment, torture, and even “outrages upon personal dignity; in particular, humiliating and degrading treatment...”<sup>82</sup> Noncombatants also, of course, are protected by the CAT. When doubt arises as to whether a civilian apparent noncombatant may have committed a belligerent act, and how they should be categorized, Geneva III, Article 5 dictates that a tribunal should be convened. The U.S. has been significantly criticized for not sufficiently adhering to this provision: “The U.S. should adhere to Geneva III’s requirement that any detainee whose POW status is in ‘doubt’ is entitled to POW status – and, therefore, cannot be subjected to coercive treatment – until a ‘competent tribunal,’ which must be convened promptly, determines otherwise.”<sup>83</sup>

Additionally, civilians who are interned by a nation-state that is also an ‘occupying power’ are granted greater and more specific privileges and protections. Geneva IV recognizes the reality that civilians can be interned by an occupying power for any number of reasons, but dictates that Civilians “shall retain their full civil capacity” and grants them even greater rights in some aspects than are granted POWs.<sup>84</sup> For instance, interned civilians are to be kept separate from POWs, and the occupying power is charged with providing for the well-being of their dependents, meaning they must provide for the family members of the interned civilians.<sup>85</sup>

The U.S. military’s treatment of civilians in the current environment, against suspected unlawful combatants or terrorists in Afghanistan and against insurgents in Iraq, is bound by the Laws mentioned above. If violated, their detention can produce harmful second-order effects. Arguably, the application of the Category I and II measures authorized by Secretary Rumsfeld in Afghanistan means that every suspect, even an innocent villager rounded up in the search and sweep for terrorists, who in fact turns out not to be a terrorist, could be exposed to yelling, deception, and generally unpleasant treatment. The U.S. maintains that the military has sorted out “more than 10,000 suspects in Afghanistan and reduced their number to a select few who would make their way to Guantanamo...”<sup>86</sup> If the Category I and II methods are not restricted to those who have been clearly and properly identified as unlawful combatants, then the

unpleasant treatment could have a galvanizing, negative effect as previously suspect detainees were released back to their communities. U.S. Forces should be very rigorous in adhering to the standards enunciated for noncombatants and should be more generous in conducting Article 5 tribunals so they are very sure of their determinations with respect to categorizing them as combatants of any kind.

## **CONCLUSION**

Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security.<sup>87</sup>

While in the aftermath of 9-11 some called for a "ruthless, 'gloves-off' response that would sweep aside legal and political obstacles,"<sup>88</sup> the American public's response to the Abu Ghraib abuses provides proof that such an approach is still inconsistent with America's values. In the post-9/11 environment, U.S. Forces should not only expect to simultaneously encounter six different types and categories of potential detainees, but they should be given clear guidance on how those detainees should be treated. They should fully recognize the categories identified above and be fully cognizant of the boundaries of treatment for each category as it is currently codified and promulgated. Whether one considers that U.S. forces should continue to fight 'with one hand tied behind their back,' or should have that hand released, U.S. forces must continue to abide by current restrictions until the debate results in changes to internationally accepted and agreed to standards. While there is good reason for the international community to coalesce around more easily understandable and more stringent measures against unlawful combatants and terrorists, in order to deter hostile forces from adopting such tactics, there is also the counter-veiling interest that we not stoop to legitimize or debase ourselves with anything near the tactics of the common enemies of mankind.

WORD COUNT=7972

## ENDNOTES

<sup>1</sup> Cofer Black, Central Intelligence Agency (CIA), testimony before the Joint House and Senate Select Intelligence Committee, 26 September 2002; available from <<http://www.freerepublic.com/focus/f-news/1112400/posts>>; Internet; accessed 16 February 2005.

<sup>2</sup> "9/11", for the purposes of this article refers to the terrorist strikes of September 11, 2001 on the World Trade Centers in New York, the Pentagon, and the aborted attempt that led to a commercial airliner crashing in a field in Pennsylvania, perpetrated by 19 Al Qaeda members, and resulting in killing almost 3,000 Americans.

<sup>3</sup> Supreme Court of Israel, "Judgment Concerning the Legality of the General Security Service's Interrogation Methods," in *Torture*, ed. Sanford Levinson (Oxford: Oxford University Press, 2004), 181. For example, in a ruling dated 6 September 1999, the Supreme Court of Israel noted: "This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties."

<sup>4</sup> Fionnuala Ni Aolain, "The European Convention on Human Rights and Its Prohibition on Torture," in *Torture*, ed. Sanford Levinson (Oxford: Oxford University Press, 2004), 213-228.

<sup>5</sup> Assistant Attorney General Jay Bybee, "Application of Treaties and Laws to Al Qaeda and Taliban Detainees," memorandum for Alberto R. Gonzales Counsel to the President, and William J. Haynes II General Counsel of the Department of Defense, 22 January 2002; available from: <<http://www.washingtonpost.com/wpshr/nation/documents/012202bybee.pdf>>; Internet; accessed 27 September 2004. Mr. Bybee was citing a letter published during the Panama conflict from Abraham D. Sofaer, Legal Advisor State Department to Richard Thornburgh, Attorney General, 31 January 1990.

<sup>6</sup> For purposes of this paper, the "Global War on Terrorism" is adopted to include all military operations conducted in the aftermath of the 9/11 attacks, to include all Operation Enduring Freedom and Operation Iraqi Freedom, and the discussion of detainees held during the GWOT includes those being held in Iraq, Afghanistan and Guantanamo Bay, Cuba unless specifically detailed otherwise.

<sup>7</sup> Alberto R. Gonzales, "Draft Memorandum," 25 January 2002, in John Barry, Michael Hirsh and Michael Isikoff, "The Roots of Torture," *Newsweek*; available from <<http://msnbc.msn.com/id/4999148/site/newsweek>>; Internet; accessed 2 February 2005.

<sup>8</sup> Donald Rumsfeld quoted in Reuters, "Geneva Convention Doesn't Cover Detainees," 11 January 2002; available from <<http://www.crimelynx.com/nogen.html>>; Internet; accessed 2 February 2005.

<sup>9</sup> Gonzales, Draft Memorandum. Gonzales stated "this new paradigm renders obsolete Geneva's strict limitations...and renders quaint some of its provisions..." and while not fully repudiating the memorandum, did qualify the memorandum at his confirmation hearing as reported by David Stout, "Gonzales Disavows Torture as Confirmation Hearings Begin," *New*

York Times; Available from <<http://www.nytimes.com/2005/01/06/politics/07gonzalezcn.html?ex=1107493200&en=8d64c7bccc8cb1e6&ei=5070>>; Internet, accessed 2 February 2005.

<sup>10</sup> Congress, Senate, Armed Services Committee, Special Subcommittee on Abu Ghraib, 108<sup>th</sup> Congress, 2d sess., 19 May 2004.

<sup>11</sup> Seymour Hersh, "The Grey Zone," *The New Yorker*, 24 May 2004, 38.

<sup>12</sup> See e.g., the Human Rights Watch documents cited at the Bibliography and Dana Priest and Barton Gellman, "U.S. Decries Abuse but Defends Interrogations; 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret." *Washington Post*, 26 December 2002, sec. A, p. 1.

<sup>13</sup> Congress, Special Subcommittee on Abu Ghraib.

<sup>14</sup> Major Robert Hrjov, "Detainee Operations Update," *Legal Center Newsletter Quarterly*, available from <[http://www.jagcnet.army.mil/LaawsXXI/Images.nsf/PICTURES/TJAGLCSQuarterlyDec%2004/\\$FILE/The%20Center%20Quarterly%20\(Dec%2004\).pdf](http://www.jagcnet.army.mil/LaawsXXI/Images.nsf/PICTURES/TJAGLCSQuarterlyDec%2004/$FILE/The%20Center%20Quarterly%20(Dec%2004).pdf)>; Internet; accessed 3 February 2005. The article reports that both AR 190-8 and FM 34-52 are currently being revised and are scheduled for publication in 2005.

<sup>15</sup> General Chalers C. Krulak, USMC, "The Strategic Corporal: Leadership in the Three Block War," *Marines Magazine*, January 1999; available from <[http://www.au.af.mil/au/awc/awcgate/usmc/strategic\\_corporal.htm](http://www.au.af.mil/au/awc/awcgate/usmc/strategic_corporal.htm)>; Internet, accessed 4 January 2005.

<sup>16</sup> Geneva Conventions, *Geneva Convention (III) Relative to the Treatment of Prisoners of War*, 12 August 1949; available from <<http://www.icrc.org/IHL.nsf/ART?Openview>>; Internet, accessed 2 February 2005. Hereafter Geneva III.

<sup>17</sup> Secretary of Defense Donald Rumsfeld and General Counsel William J. Haynes, "Action Memorandum: Counter Resistance Techniques," memorandum for the Chairman, Joint Chief of Staff, Washington D.C., 2 December 2002; Available from <<http://news.findlaw.com/hdocs/docs/dod/gcrums1127120202mem.pdf>>; Internet, accessed 14 December 2004.

<sup>18</sup> Geneva III.

<sup>19</sup> Alberto Gonzales, White House Legal Counsel, and William Haynes, General Counsel, Department of Defense, White House Press Briefing, 22 January 2004; available from <<http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html>>; Internet, accessed 27 September 2004. For instance, Judge Alberto Gonzales in a 22 January 2004 White House press briefing stated: "America today does face a different kind of enemy in Al Qaeda and its affiliates." Hereafter Gonzales, Press briefing.

<sup>20</sup> Secretary of Defense Donald Rumsfeld, "Status of Taliban and Al Qaida," memorandum for the Chairman, Joint Chief of Staff, Washington, D.C., 19 January 2002; Available from <[http://lawofwar.org/Rumsfeld%20Torture%20memo\\_0001.jpg](http://lawofwar.org/Rumsfeld%20Torture%20memo_0001.jpg)>; Internet, accessed 27 September 2004.

<sup>21</sup> George W. Bush, White House Press Briefing, Rose Garden, Washington D.C., 28 January 2002; available from <<http://www.whitehouse.gov/news/releases/2002/01/20020128-13.html>>; Internet, accessed 7 October 2004. In questions after a Rose Garden appearance with Hamid Karzai, the press asked and the President answered as follows: "Q On the issue of the detainees at Guantanamo Bay, what's wrong with formally applying the Geneva Convention to them? THE PRESIDENT: I have -- the question is about the detainees in Guantanamo Bay. I had a very interesting meeting this morning with my national security team. We're discussing all the legal ramifications of how we -- what we -- how we characterize the actions at Guantanamo Bay. A couple of things we agree on. One, they will not be treated as prisoners of war. They're illegal combatants. Secondly, they will be treated humanely. And then, I'll figure out -- I'll listen to all the legalisms and announce my decision when I make it. But we're in total agreement on how to -- on whether or not -- on how these prisoners -- or detainees, excuse me, ought to be treated. And they'll be treated well. And yesterday, the Secretary of Defense went down to Guantanamo Bay with United States senators from both political parties. The senators got to see the circumstances in which these detainees were being held. They -- I don't want to put words in their mouth, but according to the Secretary of Defense -- I'll let him put words in their mouth -- they felt like, one, that our troops were really valiant in their efforts to make sure that these killers -- these are killers -- were held in such a way that they were safe. I noticed one of our troops last night was commenting that they are receiving very good medical care. But I'll make my decision about -- on how to legally interpret the situation here pretty soon."

<sup>22</sup> Ibid.

<sup>23</sup> George W. Bush, "Humane Treatment of Al Qaeda and Taliban Detainees," White House Memorandum, Washington, D.C., 7 February 2002; available from <[http://lawofwar.org/Bush\\_memo\\_Genevas.htm](http://lawofwar.org/Bush_memo_Genevas.htm)>; Internet, accessed 27 September 2004.

<sup>24</sup> Ibid. Indeed, the memorandum makes specific mention of the written legal opinions of the Department of Justice, the Attorney General and the facts provided by the Department of Defense.

<sup>25</sup> Ibid.

<sup>26</sup> United Nations, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 26 June 1987; available from <<http://www.hrweb.org/legal/cat.html>> Internet, accessed 2 February 2005. Hereafter *Convention Against Torture* or C.A.T.).

<sup>27</sup> Vanessa Blum, "The New Rules of War; Iraqi Tactics Force JAGs to Rethink Combat Protocol," *Legal Times*, 7 April 2003, p. 1.

<sup>28</sup> Gonzales, Press briefing.

<sup>29</sup> Ibid.

<sup>30</sup> George W. Bush, "White House Fact Sheet: Status of Detainees at Guantanamo," 7 February 2002; available from <<http://www.whitehouse.gov/news/releases/2002/02/print/20020207-13.html>>; Internet, accessed 21 September 2004.

<sup>31</sup> Ibid.



<sup>32</sup> Gonzales, Draft Memorandum.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid. Particular note should be given to the phrase: "Preserves flexibility:...the need to try terrorists for war crimes such as wantonly killing civilians..."

<sup>35</sup> In discussing the issue of treating terrorists under either a criminal or Geneva paradigm, Mr Haynes, Department of Defense Deputy General Counsel, speaking at Judge Gonzales Press Briefing, 22 January 2004, stated: "Now some people think that we're wrong, we're wrongheaded in that. They say you should either charge them with a crime; or you should treat them as prisoners of war, as that term is detailed and I described earlier under the conventions; or you should let them go. Now, we think that there are other options. We're in a unique conflict. We're in a global war on terror against people who are not just committing crimes; they're killing Americans on a scale that amounts to warfare."

<sup>36</sup> By deciding "to extend basic prisoner of war protections to such persons ...based upon strong policy considerations, and ...not necessarily based on any conclusion that the United States was obligated to do so as a matter of law." Jay Bybee Memorandum.

<sup>37</sup> Geneva III, Article 4.

<sup>38</sup> Department of the Army, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*, Army Regulation 190-8, (Washington D.C.: U.S. Department of the Army, 1 October 1997), 1-1. Para 1-4 notes the Secretary of the Army as the Executive Agent for the DoD EPW, CI and RP program.

<sup>39</sup> Ibid.

<sup>40</sup> Department of the Army, *Intelligence Interrogation*, Field Manual 34-52, (Washington D.C.: U.S. Department of the Army, 28 September 1992) ii. Hereafter FM 34-52.

<sup>41</sup> Ibid., iv.

<sup>42</sup> Ibid., 1-17 and 2-21.

<sup>43</sup> Ibid., 2-13.

<sup>44</sup> Ibid., 1-9.

<sup>45</sup> Ibid., 1-10.

<sup>46</sup> Ibid., 1-7.

<sup>47</sup> Human Rights Watch, "The Road to Abu Ghraib", June 2004, Introduction; available from <<http://www.hrw.org/reports/2004/usa0604/>>; Internet; accessed 27 September 2004.

<sup>48</sup> Gonzales, Press briefing. Gonzales stated: "Now a few of the misinformed have asked whether the President's February 7<sup>th</sup> determination contributed to the abuses at Abu Ghraib. We categorically reject any connection."

<sup>49</sup> “Confusion about what interrogation techniques were authorized resulted from the proliferation of guidance and information from other theaters of operation; individual interrogator experiences in other theaters; and, the failure to distinguish between interrogation operations in other theaters and Iraq. This confusion contributed to the occurrence of some of the non-violent and non-sexual abuses.” Lieutenant General Anthony R. Jones and Major General George R. Fay, “Investigation of Intelligence Activities at Abu Ghraib,” memorandum for Acting Secretary of the Army Les Brownlee, Baghdad, Iraq, 23 August 2004, Executive Summary.

<sup>50</sup> Geneva III, Article 3.

<sup>51</sup> Geneva III, Article 10.

<sup>52</sup> Geneva III, Article 4A.(2)

<sup>53</sup> Jean Pictet, *Humanitarian Law and the Protection of War Victims* (Geneva, Switzerland: Henry Dunant Institute Press, 1975), 102.

<sup>54</sup> Geneva Conventions, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977; Available from: <<http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079>>; Internet; accessed 3 February 2005.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid. Article 44 of Protocol I provides in full:

Article 44. Combatants and prisoners of war

1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.

2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.

3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

(a) during each military engagement, and

(b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

(c) Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1

<sup>57</sup> Geneva III has been ratified by 192 nations whereas Protocol I has been ratified by 162 nations, to include the US' initial partners during OIF – the United Kingdom and Spain.

<sup>58</sup> Richard R. Baxter, "So-Called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs," *British Year Book of International Law* 1951, vol. 28, (London: Oxford University Press, 1952) pp. 323-45. Also 28 BRIT. Y.B. INT'L L. 321, 328 (1952).

<sup>59</sup> Robert K. Goldman and Brian D. Tittmore, "Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law," *The American Society of International Law*, December 2002; available from <<http://www.asil.org>>; Internet, accessed 15 February 2005.

<sup>60</sup> LTC Paul E. Kantwill and MAJ Sean Watts, Draft article, "Hostile Protected Persons or 'Extra-Conventional Persons': How Unlawful Combatants in the War of Terrorism Posed Extraordinary Challenges for Military Attorneys and Commanders;" February 2005; to be published in a future law journal.

<sup>61</sup> Baxter.

<sup>62</sup> Bush, White House Fact Sheet.

<sup>63</sup> Lieber Code, "Instructions for the Government of the Armies of the United States in the Field," articles 82-85, 24 April 1863; available from <<http://www.au.af.mil/au/awc/awcgate/law/liebercode.htm>>; Internet, accessed 15 February 2005.

<sup>64</sup> Pictet, 102.

<sup>65</sup> Baxter.

<sup>66</sup> C.A.T.

<sup>67</sup> Heather MacDonald, "How to Interrogate Terrorists," *City Journal*, Winter 2005. Available from <[http://www.city-journal.org/html/15\\_1\\_terrorists.html](http://www.city-journal.org/html/15_1_terrorists.html)>; Internet; accessed 10 January 2005. MacDonald states: "But there is a huge gray area between the gold standard of POW treatment reserved for honorable opponents and torture, which consists of the intentional infliction of severe physical and mental pain. None of the stress techniques that the military has used in the war on terror comes remotely close to torture, despite the hysterical charges of administration critics."

<sup>68</sup> Dana Priest and Barton Gellman, "U.S. Decries Abuse but Defends Interrogations," *Washington Post*, 26 December 2002, sec A1.

<sup>69</sup> Donald Rumsfeld, Secretary of Defense, and William J. Haynes, General Counsel, "Action Memorandum: Counter Resistance Techniques," memorandum for the Chairman, Joint Chief of Staff. Washington, D.C., 2 December 2002; Available from <<http://news.findlaw.com/hdocs/docs/dod/gcrums1127120202mem.pdf>>; Internet; accessed 14 December 2004.

<sup>70</sup> Ibid.

<sup>71</sup> Human Rights Watch, "The Road to Abu Ghraib," June 2004; available from <<http://www.hrw.org/reports/2004/usa0604/>>; Internet; accessed 27 September 2004, 8. Human Rights Watch cites a *Washington Post* article of 26 December 2002 and a December 2002 Human Rights Watch report.

<sup>72</sup> White House Fact Sheet, February 7, 2002.

<sup>73</sup> Gonzales, Press briefing.

<sup>74</sup> An experienced interrogator at the detention facility in Bagram Afghanistan stated that his most successful interrogation occurred when he was able to discuss the United States' compliance with human rights as a prelude to convincing him that the US forces were not the forces of evil portrayed by the Taliban or al Qaeda. Likewise, other interrogators report that success comes often by convincing them of the folly of the tactics and procedures employed by terrorists in opposition to the ideals of Islam.

<sup>75</sup> Colonel G.I.A.D. Draper, "The Legal Classification of Belligerent Individuals" in *Reflections on Law and Armed Conflicts--Selected Works on the Laws of War*, eds. Michael A. Meyer and Hilaire McCoubrey (London: Brill, 1998) 196- 200.

<sup>76</sup> Sir Michael Howard, "It's Not So Much War; It's More Like a Hunt." *The Times*, 2 October 2001; available from <<http://www.declaration.net/news.asp?docID=2356&y=2001>>; Internet; accessed 15 February 2005.

<sup>77</sup> Aolain. Also noted in LTC Diane Beaver, Staff Judge Advocate, Joint Task Force -170. "Legal Brief on Proposed Counter-Resistance Strategies," memorandum for the Commander Joint Task Force-170. Guantanamo Bay, Cuba, 11 October 2002; available from <<http://hrw.org/english/docs/2004/08/19/usdom9248.htm>>; Internet; accessed 21 September 2004.

<sup>78</sup> Supreme Court of Israel, 181.

<sup>79</sup> Dana Priest, "US Seeks Long-Term Solution for Detainees," *The Patriot News*, 3 January 2005, sec. A, p 3. Priest cites several sources but also makes the argument that George Tenet, Director CIA admitted to such conduct in his Congressional testimony, but independent analysis of Tenet's testimony calls into question such a conclusion.

<sup>80</sup> Geneva Conventions, *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949; available from <<http://www.icrc.org/IHL.nsf/ART?Openview>>; Internet; accessed 2 February 2005. Hereafter Geneva IV. See for example, Geneva IV, Article 42.

<sup>81</sup> FM 34-52, 2-17.

<sup>82</sup> Geneva III, Article 3.

<sup>83</sup> Association of the Bar of the City of New York Committee on International Human Rights, Committee on Military Affairs and Justice. "Human Rights Standards Applicable to the United States' Interrogation of Detainees," available from <<http://www.abcny.org/pdf/>>

HUMANRIGHTS.pdf>; Internet; accessed 13 August 2004. Sometimes referred to as the Horton Report. After one of its main authors.

<sup>84</sup> Geneva IV, Article 80.

<sup>85</sup> Geneva IV, Articles 81 and 83.

<sup>86</sup> Gonzales, Press briefing.

<sup>87</sup> Supreme Court of Israel, 181.

<sup>88</sup> Anthony E. Hartle, *Moral Issues in Military Decision Making*, Second Edition Revised, (Lawrence, Kansas: University Press of Kansas, 2004), p. 204.

## BIBLIOGRAPHY

- Association of the Bar of the City of New York Committee on International Human Rights, Committee on Military Affairs and Justice. "Human Rights Standards Applicable to the United States' Interrogation of Detainees." Available from <<http://www.abcnyc.org/pdf/HUMANRIGHTS.pdf>>. Internet. Accessed 27 September 2004.
- Barry, John, Michael Hirsh, and Michael Isikoff. "The Roots of Torture." *Newsweek*. Available from <<http://msnbc.msn.com/id/4999148/site/newsweek>>. Internet. Accessed 2 February 2005.
- Baxter, Richard R. "So-Called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs." *British Year Book of International Law 1951*, vol. 28. London: Oxford University Press, 1952. 323-45.
- Beaver, Diane E., Staff Judge Advocate, Joint Task Force -170. "Legal Brief on Proposed Counter-Resistance Strategies." Memorandum for the Commander Joint Task Force-170. Guantanamo Bay, Cuba, 11 October 2002. Available from <<http://hrw.org/english/docs/2004/08/19/usdom9248.htm>>. Internet. Accessed 21 September 2004.
- Black, Cofer. "Testimony Before the Joint House and Senate Select Intelligence Committee," 26 September 2002. Available from <<http://www.freerepublic.com/focus/f-news/1112400/posts>>. Internet. Accessed 16 February 2005.
- Blum, Vanessa. "The New Rules of War; Iraqi Tactics Force JAGs to Rethink Combat Protocol." *Legal Times*, 7 April 2003, p. 1.
- Bush, George W. "Humane Treatment of Al Qaeda and Taliban Detainees." Memorandum from the White House. Washington, D.C., 7 February 2002. Available from <[http://lawofwar.org/Bush\\_memo\\_Genevas.htm](http://lawofwar.org/Bush_memo_Genevas.htm)>. Internet. Accessed 27 September 2004.
- \_\_\_\_\_. *White House Fact Sheet: Status of Detainees at Guantanamo*, 7 February 2002. Available from <http://www.whitehouse.gov/news/releases/2002/02/print/20020207-13.html>. Internet. Accessed 21 September 2004.
- \_\_\_\_\_. *White House Press Briefing*, Rose Garden, Washington, D.C., 28 January 2002.
- Bybee, Jay, Assistant Attorney General. "Application of Treaties and Laws to Al Qaeda and Taliban Detainees." Memorandum for Alberto R. Gonzales Counsel to the President, and William J. Haynes II General Counsel of the Department of Defense. Washington, D.C., 22 January 2002. Available from <<http://www.washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf>>. Internet. Accessed 27 September 2004.
- Dershowitz, Alan M. *Why Terrorism Works*. New Haven: Yale University Press, 2002.
- Draper, G.I.A.D, Colonel. "The Legal Classification of Belligerent Individuals" in *Reflections on Law and Armed Conflicts--Selected Works on the Laws of War*. Eds. Michael A. Meyer and Hilaire McCoubrey. London: Brill, 1998. 196- 200.
- Elsa, Jennifer. "Treatment of 'Battlefield Detainees' in the War on Terrorism." *Congressional Research Service*. (11 April 2002).

- Geneva Conventions. Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949. Available from <<http://www.icrc.org/IHL.nsf/ART?openview>>. Internet. Accessed 15 February 2005. Also 6 U.S.T. 3316, 1949 U.S.T. Lexis 483.
- Geneva Conventions. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949. Available from <<http://www.icrc.org/IHL.nsf/ART?openview>>. Internet. Accessed 15 February 2005. Also 6 U.S.T. 3516, 1949 U.S.T. Lexis 434.
- Geneva Conventions, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. Available from <<http://www.icrc.org/IHL.nsf/ART?openview>>. Internet. Accessed 15 February 2005. Also 1977 U.S.T. LEXIS 465
- Goldman, Robert K. and Brian D. Tittmore. "Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law." *The American Society of International Law*. December 2002. Available from <<http://www.asil.org>> Internet. Accessed 15 February 2005.
- Gonzales, Alberto, White House Legal Counsel, and William Haynes, General Counsel, Department of Defense. White House Press Briefing, 22 January 2004. Available from <<http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html>>. Internet. Accessed 27 September 2004.
- Hartle, Anthony E. *Moral Issues in Military Decision Making*. Second Edition Revised. Lawrence, Kansas: University Press of Kansas, 2004.
- Haynes, William J., General Counsel to the Secretary of Defense. "Counter-Resistance Techniques." Memorandum for the Secretary of Defense. Washington D.C., 27 November 2002. Available from <<http://hrw.org/english/docs/2004/08/19/usdom9248.htm>>. Internet. Accessed 21 September 2004.
- Hersh, Seymour. "The Grey Zone." *The New Yorker*, 24 May 2004, 38-46.
- Hill, James T., Commander, U.S. Southern Command. "Counter-Resistance Techniques." Memorandum for the Chairman of the Joint Chiefs of Staff. Miami, Florida, 25 October 2002. Available from <<http://hrw.org/english/docs/2004/08/19/usdom9248.htm>>. Internet. Accessed 21 September 2004.
- Hrjov, Robert, Major, USA. "Detainee Operations Update," *Legal Center Newsletter Quarterly*; Available from <[http://www.jagcnet.army.mil/LaawsXXI/Images.nsf/PICTURES/TJAGLCSQuarterlyDec%2004/\\$FILE/The%20Center%20Quarterly%20\(Dec%2004\).pdf](http://www.jagcnet.army.mil/LaawsXXI/Images.nsf/PICTURES/TJAGLCSQuarterlyDec%2004/$FILE/The%20Center%20Quarterly%20(Dec%2004).pdf)>. Internet. Accessed 3 February 2005.
- Howard, Michael, Sir. "It's Not So Much War; It's More Like a Hunt." *The Times*, 2 October 2001; Available from <<http://www.declaration.net/news.asp?docID=2356&y=2001>>. Internet. Accessed 15 February 2005.
- Human Rights Watch. "A Broad Pattern of Abuse and Denial." Available from <[http://www.history.pomona.edu/vis/05h21/readings/hrw\\_iraq\\_torture.html](http://www.history.pomona.edu/vis/05h21/readings/hrw_iraq_torture.html)>. Internet. Accessed 3 February 2005.

- \_\_\_\_\_. "Interrogation Techniques for Guantanamo Detainees." Available from <<http://hrw.org/english/docs/2004/08/19/usdom9248.htm>>. Internet. Accessed 21 September 2004.
- \_\_\_\_\_. "The Road to Abu Ghraib," June 2004. Available from <<http://www.hrw.org/reports/2004/usa0604/>>. Internet. Accessed 27 September 2004.
- Jinks, Derek. "Protective Parity and the Laws of War." University of Chicago School of Law, Public Law and Legal Theory Working Paper No. 64. June 2004. Available from <<http://www.law.uchicago.edu/academics/publiclaw/resources/64-jinks.pdf>>. Internet. Accessed 15 February 2005.
- Jones, Anthony R., Lieutenant General, and Fay, George R., Major General. "Investigation of Intelligence Activities at Abu Ghraib." memorandum for Acting Secretary of the Army Les Brownlee. Baghdad, Iraq: 23 August 2004.
- Krulak, Chalers C., General, USMC. "The Strategic Corporal: Leadership in the Three Block War," *Marines Magazine* (January 1999). Available from <[http://www.au.af.mil/au/awc/awcgate/usmc/strategic\\_corporal.htm](http://www.au.af.mil/au/awc/awcgate/usmc/strategic_corporal.htm)>. Internet. Accessed 4 January 2005.
- Levinson, Sanford. ed. *Torture*, Oxford: Oxford University Press, 2004.
- Lewis, Neil A. "Red Cross Finds Detainee Abuse in Guantanamo." *New York Times*, 30 November 2004, sec. A, p.1.
- \_\_\_\_\_. "Disagreement Over Detainees' Legal Rights Simmers." *New York Times*, 1 November 2004, sec. A, p.1.
- Lieber Code. "Instructions for the Government of the Armies of the United States in the Field. 24 April 1863. Available from <<http://www.au.af.mil/au/awc/awcgate/law/liebercode.htm>>. Internet. Accessed 15 February 2005.
- MacDonald, Heather. "How to Interrogate Terrorists." *City Journal*. Winter 2005. Available from <[http://www.city-journal.org/html/15\\_1\\_terrorists.html](http://www.city-journal.org/html/15_1_terrorists.html)>. Internet. Accessed 10 January 2005.
- Phifer, Gerald, Director J2, Joint Task Force -170. "Request for Approval of Counter-Resistance Strategies." Memorandum for the Commander Joint Task Force-170. Guantanamo Bay, Cuba, 11 October 2002. Available from <<http://hrw.org/english/docs/2004/08/19/usdom9248.htm>>. Internet. Accessed 21 September 2004.
- Pictet, Jean. *Humanitarian Law and the Protection of War Victims*. Geneva, Switzerland: Henry Dunant Institute Press, 1975.
- Priest, Dana and Barton Gellman. "U.S. Decries Abuse but Defends Interrogations; 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret." *Washington Post*, 26 December 2002, sec. A, p. 1.
- Priest, Dana. "US Seeks Long-Term Solution for Detainees." *The Patriot News*, 3 January 2005, sec. A, p 3.



Rumsfeld, Donald. Secretary of Defense. "Status of Taliban and Al Qaida" Memorandum for the Chairman, Joint Chief of Staff. Washington D.C., 19 January 2002. Available from <[http://lawofwar.org/Rumsfeld%20Torture% 20memo\\_0001.jpg](http://lawofwar.org/Rumsfeld%20Torture%20memo_0001.jpg)>. Internet. Accessed 27 September 2004.

\_\_\_\_\_. Quoted in Reuters, "Geneva Convention Doesn't Cover Detainees," 11 January 2002. Available from <<http://www.crimelynx.com/nogen.html>>. Internet. Accessed 2 February 2005.

Rumsfeld Donald, Secretary of Defense, and William J Haynes, General Counsel. "Action Memorandum: Counter Resistance Techniques." Memorandum for the Chairman, Joint Chief of Staff. Washington D.C., 2 December 2002; Available from <[http://news.findlaw.com/hdocs/docs/ dod/gcrums1127120202mem.pdf](http://news.findlaw.com/hdocs/docs/dod/gcrums1127120202mem.pdf)>. Internet, accessed 14 December 2004.

Stout, David. "Gonzales Disavows Torture as Confirmation Hearings Begin." *New York Times*. Available from <<http://www.nytimes.com/2005/01/06/politics/07gonzalezcmd.html?ex=1107493200&en=8d64c7bccc8cb1e6&ei=5070>>. Internet. Accessed 2 February 2005.

United Nations. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 26 June 1987. Available from <[http://www.unhchr.ch/html/menu3/b/h\\_cat39.htm](http://www.unhchr.ch/html/menu3/b/h_cat39.htm)>. Internet. Accessed 27 September 2004.

U.S. Congress, Senate, Armed Services Committee, Special Subcommittee on Abu Ghraib. 108<sup>th</sup> Congress, 2d sess., 19 May 2004

U.S. Department of the Army. *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*. Army Regulation 190-8. Washington D.C.: U.S. Department of the Army, 1 October 1997.

\_\_\_\_\_. *Intelligence Interrogation*. Field Manual 34-52. Washington D.C.: U.S. Department of the Army, 28 September 1992.